Supreme Court, U.S.
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No. 88-1201

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

DARREL G. HARDEN,

Petitioner,

vs.

C. W. BERT, D. M. EGLE, J. E. FRANCIS, M. C. JISCHKE, T. J. LOVE, W. R. UPTHEGROVE, Individually, and THE BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA, a Subdivision of the State of Oklahoma,

Respondents.

REPLY BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Elvin J. Brown
117 East Main Street
Norman, Oklahoma 73069
Tel. No. 405/321-3341
ATTORNEY FOR PETITIONER

March, 1989

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REPLY TO RESPONDENTS' STATEMENT OF THE CASE

Petitioner has heretofore furnished a statement of the case as required by Rule 21 of the Court. Had there been any error or omission in petitioner's statement, it was respondents' duty to point it out and provide corrections. Respondents did not challenge any part of petitioner's statement, and it should be assumed to be correct.

However, Respondents have set forth their own version of the allegations of the complaint as the admitted facts and assert that based on their version, this case boils down to a 'personal feud,' and the Petition was correctly dismissed.

Petitioner respectfully submits the Questions Presented in his Petition for Certiorari are not affected or modified by the scandalized characterization of the Second Amended complaint. Absent a

showing why the Petitioner's statement of the case is insufficient for an adequate understanding of the questions presented, or how the respondents' statement of facts is necessary for the disposition of the questions raised, petitioner urges disregard of respondents' fact statement as an attempt to obscure issues which the respondents are otherwise unable to address.

PROPOSITION I

FIDUCIARY RELATIONSHIP UNDER OKLAHOMA LAW IS A QUESTION OF FACT FOR THE TRIER OF FACT, PRECLUDING DISPOSITION ON A MOTION TO DISMISS UNDER RULE 12(B)(6).

Respondents concede the authorities cited by the petitioner establish that in Oklahoma the statute of limitations is tolled by an abuse of fiduciary relationship in concealing a cause of action. However, they argue that, "In this case,

Professor Harden offers no authority for his contention that the University occupies the position of a fiduciary." (Opposition Brief, p. 11.) Oklahoma law advises that fiduciary relationship is a question of fact. The "facts" to be considered on a Motion to Dismiss are those alleged in the Complaint, together with the reasonable inferences therefrom. A prior decision on different facts will not be dispositive of the fact issue in this case. In Ewing v. Ewing, 126 Pac. 811, 815 (Okl. 1912), the Oklahoma Supreme Court addressed fiduciary relationships and ever since has said:

> "The term 'fiduciary or confidential relation,' as used in this connection, is a very broad one. It has been said that it exists, and that relief is granted, in all cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed. The origin of the confidence and the source of the influence are immaterial. The rule embraces both technical fiduciary

> relations and those informal relations which exist whenever one man trusts in and relies upon another. The only question is, Does such a relation in fact exist?"

Fiduciary relationship being a question of fact, the search here is not for additional authority but must be for allegations establishing fiduciary relations. For example, petitioner alleged among other things his employment at the respondent University, and that individual respondent Bert, as his supervisor, agreed to collect and submit confidential references regarding petitioner's promotion. The relationship in the first instance is that of a master and servant, and in the second instance that of a principal and agent. Under Oklahoma law, such allegations impute a fiduciary relationship. In Ewing, supra, at page 815, the Oklahoma Court clearly es-

tablished a cause of action under the allegations in Harden's case by holding:

> "The confidential relation is not all confined to any specific association of the parties to it. While its more frequent illustrations are between persons who are related as trustee and cestui que trust, guardian and ward, attorney and client, parent and child, husband and wife, it embraces partners and copartners, principal and agent, master and servant, physician and patient, and generally all persons who are associated by any relation of trust and confidence." (Emphasis added.)

None of the cases cited by respondents (Opposition Brief, p. 13) pertain to fiduciary relationships.

The Tenth Circuit's order has absolved the University and its officers from all obligations arising out of the trust relationships imposed by Oklahoma law. A granting of the requested writ will permit resolution of this conflict between the state court of last resort and federal court of appeals.

PROPOSITION II

THE ISSUE OF ACADEMIC FREEDOM BEING A CONSTITUTIONALLY PROTECTED RIGHT IS PROPERLY BEFORE THIS COURT.

Respondents seek to avoid consideration of the issue of academic freedom being a constitutionally protected right, as not essential for the determination of this case. (Opposition Brief, p. 16.) Their reason is the Tenth Circuit found the complaint lacked indications that respondents acted in their individual capacities under color of state law required under § 1983. (Petition, pp. 17a, 18a.)

Even if the Circuit Court is correct and petitioner can not prove the six individual respondents (all of whom were alleged to have been his supervisors and officers of the University at one time or another during times pertinent to this Complaint) were acting under color of

state law, "academic freedom" still must be considered in connection with his prayer for injunctive relief and in connection with his § 1985(3) claim for damages.

If academic freedom as a constitutional right is continually being violated, injunctive relief may be a necessary remedy to uphold and enforce the integrity of the federal right.

If academic freedom enjoys the status of a constitutionally protected right, the injury that flows from the violation of it is compensable in damages, under § 1985(3).

For these reasons, the issue of academic freedom is properly and necessarily before the court, and its status warrants immediate declaration.

PROPOSITION III

DEPRIVATION OF PROPERTY BY OVERT ACTS IN FURTHERANCE OF AN UNSUCCESSFUL CONSPIRACY IS ACTIONABLE UNDER FEDERAL STATUTES.

Respondents in their opposition Brief have simply reiterated their position that the petitioner did not quit, therefore no property was taken away from him. They make no response to petitioner's claim that diminished income caused by their concerted attempts to make him quit, (achieved by circumventing the protection given to the employment and incomes of tenured professors enjoying academic freedom) is a deprivation of property.

Respondents contention that this action for conspiracy cannot be brought until the petitioner actually quits is without merit. A conspiracy does not have to be successful to be actionable, but it must have caused injury. 15A C.J.S. 608, et seq., Conspiracy, §§ 6, 44. Rutkin v.

Reinfield, 229 F.2d 248, 252 (2nd Cir. 1956), cert. den. sub nom. Kaplow v. Reinfield, 352 U.S. 844 (1956). When injury involves federally protected property rights, it is actionable under 42 U.S.C. §§ 1983, and 1985(3).

The question raised here is neither unique to this petitioner, nor to this University. A specific ruling that the income produced through the tenure of a professor is a part of his property right, and that arbitrary interference therewith infringes the federally protected right of tenure would heal a chronic wound on the academic body. This Honorable Court has repeatedly said, "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American Schools." Shelton v. Tucker, 364 U.S. 479, 487 (1960). Cf. Wieman v. Updegraf, 344 U.S. 183, 195 (1952), Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

Petitioner respectfully urges grant of certiorari to ensure such vigilant protection continues.

PROPOSITION IV

AN ISSUE INVOLVING VIOLATIONS OF TENURE MUST BE VIEWED AS CLASS-BASED.

Respondents' statement that violation of petitioner's tenure rights is only a "private feud" (Opposition Brief, p. 19) is an affront to the findings in Wieman v. Updegraff, supra, cited at p. 23 of the Petition herein. No argument is advanced as to why the Court should retreat from that decision in this case.

Petitioner has contended in the District Court, the Tenth Circuit and here that he suffered because he has tenure, and even the respondents realized they could not summarily terminate him. They resorted to their conspiracy because of his tenure protections. Allegations of

tenure and the conspiracy to constructively abrogate it establish a prima facie case of invidious discriminatory animus toward this member of the protected class.

Respondents' citations of Muller v. United States Steel Corp., 509 F.2d 923 (10th Cir. 1975), cert. denied 423 U.S. 825 (1975), and Irving v. Dubuque Packing Co., 689 F.2d 170, 172 (10th Cir. 1982) for the proposition that "the employer's action must be intended by the employer as an effort to force the employee to quit" (Opposition Brief, p. 18) may be appropriate in a discussion on the merits of the allegations of constructive discharge. However, it is inappropriate here as the Tenth Circuit's order did not reach the "merits" of this case, and this issue is not before the Court for review.

Petitioner's allegations of conspiracy are allegations of deliberate and intentional action. The requirement of

agreement of two or more to constitute conspiracy precludes negligence.

Liberty and property rights of teachers are no different than the fundamental rights guaranteed all citizens under the Fourteenth Amendment to the Constitution, which predates the Civil Right Acts of 1871. This Honorable Court's requirement laid down in United Bhd. of Carpenters and Joiners Local 610 v. Scott, 463 U.S. 825, 835-39 (1983) that invidious class based discrimination must be of the type envisioned by the framers of the Civil Rights Act of 1871 is clearly met by the Complaint. The ruling to the contrary by the Tenth Circuit warrants review and a specific finding that tenured teachers constitute a class for the purposes of 42 U.S.C. § 1985(3).

PROPOSITION V

THE TENTH CIRCUIT MISINTERPRETED THE RELATIONSHIP OF STATUTES IN TITLE VII AND 42 U.S.C. 1985(3).

Petitioner has specifically questioned the Tenth Circuit's interpretation of Great American Federal Savings and Loan Assoc. v. Novotny, 442 U.S. 366 (1979), and its application to the facts of this and like cases. Respondents did not respond directly but addressed it in their Proposition IV (Opposition Brief, pp. 20, 21). Respondents tell us "the Court merely includes an additional possibility for the propriety of the dismissal." However, the Tenth Circuit specifically said: "In addition, to the extent that Mr. Harden's injury can be redressed by an action under Title VII for constructive discharge, he may not bring an action under § 1985." (Petition, p. 21a.) The Tenth Circuit cited Novotny, supra, as an additional reason for dismissal which

simply means that if this Honorable Court grants certiorari and reverses the decision of the Tenth Circuit only on the issue of alleged class based discrimination, the Tenth Circuit would still dismiss the 1985(3) claim based on its misinterpretation of Novotny. Nowhere in his complaint does petitioner make any discrimination allegations that would entitle him to Title VII relief, although such argument was raised by respondents in the Tenth Circuit, but without reference to any specific part of the Complaint.

PROPOSITION VI

CONFLICT OF OPINIONS IN THE COURT OF APPEALS WARRANTS REVIEW ON THE ISSUE OF THE ELEVENTH AMENDMENT IMMUNITY FOR THE STATE'S PRIVATE INSURER.

Petitioner urged this Honorable Court that the disposition of the Eleventh Amendment issue by the Tenth Circuit conflicts with the ruling of the Eleventh

Circuit in Travelers Indemnity Co. v. School Board of Dade County, 666 F.2d 505 (11th Cir.1982), cert den. 549 U.S. 834 (1982). Respondents state Travelers is distinguishable because the School Board defendant therein was not normally considered a state agency. (Opposition Brief, p. 23.) However, the ruling of Travelers is applicable to all state agencies, and the Eleventh Circuit has used the same rationale for state Universities considered an arm of the state. In Harden v. Adams, 760 F.2d 1158 (11th Cir.1985), the mere fact that Troy State University was twice previously ruled an arm of the State by the Supreme Court of Alabama was considered insufficient for automatic granting of Eleventh Amendment immunity, and that Court of Appeals ruled the insurance available to the university, or any other fund for damage payment would operate to remove the case from the scope

of Eleventh Amendment immunity. Petitioner reasserts the Motion to Dismiss in this case would have been denied in the Eleventh Circuit, and dismissal of this case by the Tenth Circuit denies petitioner equal protection of law.

Respondents stated further (Opposition Brief, p. 24) that the "Tenth Circuit judgment on this issue is in accord with judgments of other federal courts of appeal, notwithstanding Travelers." However, they did not favor us with any citations to confirm the accuracy of their conclusion.

Petitioner does not read the Eleventh Amendment to bestow on states the power to assign or extend their federal court immunity to one they have chosen and paid to assume their financial liabilities. Certiorari must be granted to review this unwarranted limitation on the judicial power of the United States.

PROPOSITION VII

THE SUPREME COURT SHOULD EXERCISE ITS SUPERVISORY POWER TO RESTRAIN THE TENTH CIRCUIT'S EXTREME DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEDURE.

Respondents have totally failed to rationalize any response to petitioner's seventh issue concerning the Tenth Circuit's arbitrary presumption that he will be unable to prove the allegations of his Complaint. (Petition, p. 8a.) In Proposition VII (Petition, pp. 30-34), the petitioner set forth the extreme departure from the normal course of judicial procedure which occurred in this case. Respondents in their Proposition VI (Opposition Brief, p. 25) deny need for this court's supervision, but fail to utter a single word rebutting the accuracy of petitioner's recital of the extraordinary assumptions indulged against the

pleader. See Petition for Certiorari, p. 11a.

If the Tenth Circuit's action deviates so much that respondents can utter nothing in its defense, then such action must be reviewed to assure accuracy and integrity in the judicial process.

PROPOSITION VIII

A CONTINUING VIOLATION OF LAW IS AN IRREPARABLE INJURY NECESSITATING INJUNCTIVE RELIEF.

Respondents did not deny the continuing character of the injury in this case. Petitioner respectfully submits that whenever a continuing conspiracy is alleged, relief reasonably consists of two parts: The first pertains to damages sustained to date by its victim, and the second relates to abating the conspiracy to prevent future damages. The conclusion reached by the Circuit Court (Petition, pp. 15a, et seq.) that, " . . . we cannot

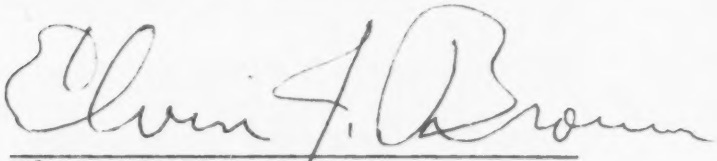
determine what specific action Mr. Harden seeks to enjoin. Broad 'obey the law' injunctions or injunctions against discrimination in general are simply impermissible," can only be justified if the allegations of the Complaint are disregarded in their entirety, or if there is no confidence or faith in the District Court's ability to issue a reasonable and appropriate injunction. The Court of Appeals dismissed the cause of action for accrued damages, and it must have disregarded the allegations of continuing injury for consideration in connection with the request for equitable relief to enjoin the continuing conspiracy. Respondents offer nothing as to why the multiplicity of actions necessarily resulting from a continuing conspiracy is not in itself sufficient to support the request for an injunction, as approved by this Honorable Court. Review of the Tenth

Circuit's denial of injunctive relief is necessary to uphold the public policy behind statutes prohibiting conspiracies.

CONCLUSION

Petitioner sincerely prays the writ issue.

Respectfully submitted,



Elvin J. Brown
ATTORNEY FOR PETITIONER